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NO. 27548-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT ALAN BROWN,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

ROBERT ALAN BROWN requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Brown seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated June 17, 2010. (Appendix "A" 1-20)

3. ISSUES PRESENTED FOR REVIEW

A. If the conviction for the predicate felony in a "felony-murder" prosecution is reversed, has the felony-murder conviction been established beyond a reasonable doubt?

B. Is Instruction 5, based on former WPIC 25.01, inherently prejudicial in a felony-murder prosecution?

C. Does cumulative error require reversal of the felony-murder conviction?

4. STATEMENT OF THE CASE

Sebastian Esquibel's body was found beneath a woodpile near Darknell Road on January 16, 2006. His hands and feet were tied with jumper cables. There was a bag over his head. He had been shot in the back of the head. (Trial RP 396, ll. 9-16; RP 397, ll. 1-8; ll. 14-19; RP 418, ll. 14-16)

Danny Gurule is Mr. Esquibel's father. He talked to Mr. Esquibel on May 18, 2005. He wired him money to come home. He never saw or

heard from his son again. (Trial RP 385, ll. 10-15; RP 387, ll. 1-15; ll. 21-22)

Levoy Burnham and Shannon Burnham were living in a fifth wheel trailer behind Mr. Brown's house at 5006 North Helena in May 2005. (Trial RP 446, ll. 6-11; ll. 14-24; RP 503, ll. 9-15)

Mr. Burnham tried to arrange a drug deal involving Mr. Esquibel and Carlton Hritsco. Eight hundred ($800.00) dollars was fronted to Mr. Esquibel. He did not deliver the drugs. He did not return the money. (Trial RP 449, ll. 15-19; RP 480, ll. 3-12; RP 480, ll. 18-20; RP 483, ll. 19-25; RP 521, ll. 5-13)

Mr. Burnham brought Mr. Esquibel to the fifth wheel trailer. His hands were duct-taped. He was naked except for his underwear. Mr. Burnham continuously asked Mr. Esquibel - "Where's the money?" (Trial RP 448, ll. 17-25; RP 452, ll. 2-4; RP 454, ll. 2-3; ll. 9-12)

While Mr. Esquibel was being held in the trailer, Mr. Hritsco and Theodore Kosewicz arrived. Mr. Hritsco brought a gun to the trailer at Mr. Burnham's request. (Trial RP 450, ll. 10-13; RP 452, ll. 11-13; RP 453, ll. 8-14; RP 484, ll. 5-7; ll. 15-20)

Mr. Kosewicz is known as an enforcer. He kicked Mr. Esquibel and questioned him about the money. (Trial RP 453, ll. 22-24; RP 521, ll. 15-20)

Mr. Burnham eventually called Amber Johnson. He asked her to bring her van over to the trailer. When she arrived she saw Mr. Esquibel

tied up. David Collins was with her. Mr. Collins and Mr. Burnham pushed Mr. Esquibel into the van. Mr. Kosewicz also arrived and got into the van. Ms. Johnson recalled seeing Mr. Brown very briefly when Mr. Esquibel was being loaded into the van. (Trial RP 456, ll. 2-17; ll. 23-25; RP 457, ll. 8-11; RP 458, ll. 11-16; RP 612, ll. 14-17; RP 614, ll. 15-17; RP 617, ll. 4-11; ll. 18-22; RP 620, ll. 5-12)

Mr. Burnham directed Ms. Johnson to drive to Mr. Hritsco's. Mr. Hritsco came out and told them to leave. After leaving Mr. Hritsco's, Mr. Burnham and Mr. Kosewicz argued about what they should do. It was only after Mr. Hritsco refused to talk to them that they formulated any plan. Ms. Johnson drove to her house. Mr. Esquibel was taken into the basement and put into the laundry room. (Trial RP 618, ll. 12-13; RP 619, ll. 7-14; RP 621, ll. 17-21; RP 642, ll. 2-15)

Mr. Esquibel was later placed back in the van. Ms. Johnson continued to drive. Mr. Burnham, Mr. Kosewicz and Mr. Collins were also in the van. Mr. Kosewicz directed Ms. Johnson to drive into the country. (Trial RP 622, ll. 6-9; RP 624, ll. 16-22)

Mr. Kosewicz told Ms. Johnson to stop the van. He and Mr. Burnham took Mr. Esquibel into a field. Ms. Johnson heard a gunshot. After Mr. Kosewicz and Mr. Burnham returned to the van she was told to drive away. Mr. Kosewicz told everyone to keep their mouth shut and that he'd replace the carpet in her van. The carpet was changed within the next

two (2) days. (Trial RP 627, ll. 8-13; RP 628, ll. 12-21; RP 631, ll. 5-9; ll. 17-25)

On March 15, 2006 Mr. Brown contacted detectives at the Spokane Public Safety Building. He told them that he wanted to provide information about Mr. Esquibel's death.

Mr. Brown told Detective Marske that there were four (4) people involved with Mr. Esquibel's death and that the trailer had been cleaned by those people. The people included Mr. Burnham, Ms. Burnham and Mr. Hritsco. He would not confirm if Mr. Kosewicz was involved. (Trial RP 518, l. 16; RP 519, ll. 15-24; RP 520, ll. 12-16; RP 521, ll. 1-3)

Mr. Brown also told the detective that he was inside the trailer and saw Mr. Esquibel. He remained in the trailer with Ms. Burnham when Mr. Burnham left. He was holding the gun that Mr. Hritsco had brought to the trailer. (Trial RP 452, ll. 16-20; RP 522, ll. 2-4; ll. 7-10; RP 525, ll. 18-20; RP 529, ll. 22-25; RP 659, l. 22 to RP 660, l. 5)

Ms. Burnham recalled Mr. Brown asking Mr. Esquibel about the money. Mr. Brown also told Mr. Esquibel he should not have done it. (Trial RP 464, ll. 6-11)

Mr. Brown was present when there was a discussion as to Mr. Esquibel's involvement with Mexican gangs. He volunteered to find out if Mr. Esquibel was a Mexican gangster. He went to Amanda Brown's (aka Amanda Demers) and learned that Mr. Esquibel was not involved with any

Mexican gang. He returned to the trailer and told the others what he had learned. (Trial RP 526, ll. 9-14; ll. 21-22; RP 527, ll. 2-6; Exhibit 66)

Mr. Brown admitted that he hit Mr. Esquibel one (1) time in the head. He had skinned knuckles when he went to Ms. Brown's house. (Trial RP 529, ll. 16-18; RP 647, ll. 3-9) Mr. Brown advised Detective Marske that he believed Mr. Burnham and the others were only trying to scare Mr. Esquibel. They only wanted their money back. He did not believe they intended to kill him. (Trial RP 523, ll. 22-24; RP 524, ll. 10-13)

An Information was filed on November 14, 2007 charging Mr. Brown with first degree kidnapping under Count II, conspiracy to commit first degree kidnapping under Count IV and first degree assault under Count V. (CP 1)

An Amended Information was filed on March 20, 2008. Mr. Brown was now charged with first degree murder, first degree kidnapping, conspiracy to commit the first degree kidnapping and first degree assault. (CP 25)

Various continuances and waivers were filed. Trial commenced on October 13, 2008. (CP 18; CP 22; CP 27; CP 29; CP 31)

Prior to trial a Second Amended Information was filed. Count I charged Mr. Brown with first degree murder in the alternative. The alternatives were premeditation and felony-murder based upon first degree kidnapping. Count II charged Mr. Brown with first degree kidnapping.

Count III involved conspiracy to commit first degree kidnapping. Each count carried a firearm enhancement. (CP 147)

Mr. Brown did not object to any of the jury instructions. Instruction 5 is no longer a recommended instruction. Instructions 15 and 16 contain an uncharged alternative as to first degree kidnapping.

The jury found Mr. Brown not guilty of premeditated first degree murder. He was found guilty of felony-murder based upon first degree kidnapping. He was found guilty of first degree kidnapping. He was found not guilty of conspiracy to commit first degree kidnapping. The jury also determined that the firearm enhancements applied to the two (2) guilty verdicts. (Trial RP 763, l. 15 to RP 764, l. 25; CP 377; CP 378; CP 379; CP 380; CP 381)

Judgment and sentence was entered on November 24, 2008. The trial court ruled that Counts I and II merged. Mr. Brown was sentenced to four hundred and eighty (480) months plus a sixty (60) month firearm enhancement. The trial court ruled that the enhancements merged. (CP 421)

Mr. Brown had previously filed a Notice of Appeal on October 30, 2008. (CP 390)

The Court of Appeals issued its Unpublished Opinion on June 17, 2010 reversing Mr. Brown's first degree knapping conviction; but affirming the felony-murder conviction which was based on the predicate felony of kidnapping.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision discusses the following factual predicates to support Mr. Brown's conviction for felony-murder:

a. He talked with Mr. Burnham who brought Mr. Esquibel to the trailer;

b. He knew Mr. Esquibel was in the trailer;

c. He hit Mr. Esquibel;

d. He held a gun on Mr. Esquibel;

e. He checked out whether or not Mr. Esquibel was in a Mexican gang;

f. His jumper cables were used to bind Mr. Esquibel.

Based upon the forgoing factual predicates the Court of Appeals determined that Mr. Brown was an accomplice to kidnapping and thus an accomplice to felony-murder. Yet, the underlying kidnapping conviction was reversed due to instructional error.

Instructional error on the predicate felony for felony-murder necessarily impacts a jury's consideration of the felony-murder charge. The argument that the elements of the underlying felony do not need to be set out in either the information or the instructions is not entirely accurate. In the absence of a comprehensive, correct understanding of the elements of an underlying felony, there is no way for a jury to conclude, beyond a

reasonable doubt, that the underlying felony was committed in conjunction with a subsequent murder.

Mr. Brown concurs that a felony-murder charge can be established by any of the alternative means of the underlying offense. However, the Court of Appeals does not cite a case where a felony-murder conviction has been affirmed based upon an Information containing one (1) alternative means and the jury instructions containing a different alternative means of committing the underlying offense.

Const. art. I, § 22 provides, in part:

> In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him [and] to have a copy thereof ....

The Sixth Amendment to the United States Constitution, provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation ....

These constitutional provisions have become known as the "essential elements" rule. This means that a criminal defendant must be fully advised of each and every element of the offense that he is accused of committing.

> 'The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.' *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Merely reciting the

> statutory elements of the charged crime may not be sufficient.

State v. Greathouse, 113 Wn. App. 889, 899-900, 56 P.3d 569 (2002), *reconsideration denied, review denied,* 149 Wn.2d 1014, 69 P.3d 875.

The evidence clearly establishes that Mr. Brown was only peripherally involved with any kidnapping. Moreover, the fact that the jury found Mr. Brown not guilty of conspiracy to commit first degree kidnapping supports his position of limited involvement.

Mr. Brown's felony-murder conviction is based upon the jury's determination that he was guilty of first degree kidnapping. Because the first degree kidnapping conviction has been reversed and remanded for a new trial, then, of necessity, the felony-murder conviction must be reversed and remanded for a new trial.

The State recognizes that it must prove the elements of the underlying felony beyond a reasonable doubt. *See: State v. Bryant,* 65 Wn. App. 428, 438, n. 11, 828 P.2d 821, *review denied,* 119 Wn.2d 1015 (1992).

Yet, the State did not present an iota of evidence that Mr. Brown was involved in the actual kidnapping of Mr. Esquibel. The evidence establishes that Mr. Brown became aware, after the fact, that Mr. Esquibel was being held in the fifth wheel trailer.

Since the State charged Mr. Brown with first degree kidnapping, as well as conspiracy to commit first degree kidnapping, the fact that the jury

found Mr. Brown not guilty of conspiracy to commit first degree kidnapping indicates that there was no agreement between Mr. Brown and anyone else to commit that crime.

Thus, in order to find Mr. Brown guilty of first degree kidnapping, the jury had to determine that he was either a principal or an accomplice.

> The language of the felony murder provision of the first degree murder statute requires that a "coparticipant" be one who actually commits or attempts to commit the underlying felony. ... Thus, in order for a person to be found guilty of felony murder, the State must prove that he or she committed or attempted to commit a predicate felony *and* that he or she, or a coparticipant, committed homicide in the course of commission of the felony.

State v. Carter, 154 Wn.2d 71, 80, 109 P.3d 823 (2005).

Mr. Brown did not solicit, command, encourage, or request anyone to commit the crime of first degree kidnapping.

Mr. Brown did not solicit, command, encourage, or request any person to commit the crime of first degree felony-murder.

Mr. Brown was not present when Mr. Burnham brought Mr. Esquibel to the trailer.

Mr. Brown was not present when Mr. Esquibel was being transported from the fifth wheel trailer to Mr. Hritsco's, then to Ms. Johnson's, then to the scene of his death.

Mr. Brown was not present when Mr. Burnham and Mr. Kosewicz discussed killing Mr. Esquibel.

Mr. Brown was not present when Mr. Esquibel was shot.

The evidence clearly establishes that Mr. Brown was not involved in Mr. Esquibel's actual death. He was not at the scene. He was not in the van. He remained at home.

Mr. Brown concedes that an accomplice does not need to be present at the time a crime is committed. *See: State v. Dove,* 52 Wn. App. 81, 88, 757 P.2d 990 (1988).

Nevertheless, the record does not support a conclusion that Mr. Brown aided either Mr. Burnham, Ms. Burnham, or Mr. Kosewicz in planning or committing an actual kidnapping.

The trial court instructed the jury that Mr. Brown had a duty to act. Instruction 5 is based upon former WPIC 25.01. The COMMENT to WPIC 25.01 states, in part: "The instruction is being withdrawn because it is no longer helpful to the jury."

The withdrawal of WPIC 25.01 is based upon the decision in *State v. Jackson,* 137 Wn.2d 712, 722, 976 P.2d 1229 (1999) where the Court stated:

> RCW 9A.08.020(3) ... does not extend accomplice liability to a person ... based on the person's failure to fulfill a duty to come to the aid of another.

Mr. Brown contends that this instruction tainted the rest of the jury instructions. It allowed the jury to convict him based upon his failure to contact law enforcement.

The deputy prosecutor, in closing argument, inferred that Mr. Brown had a duty to act when he stated:

> When Sebastian tries to plead, the moment he had the opportunity to let Sebastian go, what did he do? Nothing.

(Trial RP 749, ll. 15-18)

Then again, in rebuttal argument, the deputy prosecutor stated:

> Doesn't disregard the fact that he had an opportunity to let Mr. Esquibel go and stop this incident.

(Trial RP 754, ll. 9-11)

The inclusion of this instruction not only compounds the other instructional error but also impacts Mr. Brown's right to a constitutionally fair trial. *See:* Const. art. I, §§ 3 and 22; Sixth and Fourteenth Amendments to the United States Constitution.

Jury instructions must correctly state the law. They must be so worded as to be readily understood and not misleading to the ordinary mind. An erroneous jury instruction deprives a person of a fair and constitutional trial. *State v. Dana,* 73 Wn.2d 533, 537, 439 P.2d 400 (1968); *see also Yakima v. Irwin,* 70 Wn. App. 1, 10, 851 P.2d 724 (1993).

Any argument that Instruction 5 was not prejudicial fails due to the fact that the prosecutor argued in both his closing and rebuttal arguments

that Mr. Brown failed to act and thus was responsible for Mr. Esquibel's death.

The Court of Appeals decision that the State did not argue "failure to act" is erroneous. As such, it undermines the reasoning of the opinion and the conclusion that Instruction 5 was not prejudicial or a violation of Mr. Brown's constitutional rights.

> It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. ....
>
> ...
>
> [C]onstitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.

State v. Lopez, 95 Wn. App. 842, 957, 980 P.2d 224 (1999).

Mr. Brown contends that the constitutional errors which occurred in his case require reversal both independently and cumulatively.

The constitutional error is not harmless. Instructional error allowed the jury to convict him on both an uncharged alternative and a misstatement of the law.

CONCLUSION

Mr. Brown contends that the Court of Appeals decision implicates RAP 13.4(b)(1), (2) and (3).

Under the facts and circumstances of Mr. Brown's case it cannot be said that the jury would have reached the same conclusion if it had been properly instructed on the law.

The fact that an uncharged alternative to first degree kidnapping was included in Instructions 15 and 16 allowed the jury to improperly convict Mr. Brown.

Instruction 5 is based upon WPIC 25.01. WPIC 25.01 is no longer a valid instruction. The instruction allowed the jury to convict Mr. Brown if it believed that he had a duty to act and failed to do so. The prosecuting attorney argued that Mr. Brown had a duty to act.

Since WPIC 25.01 is a misstatement of the law and Mr. Brown's conviction for the underlying felony has been reversed, Mr. Brown's conviction as an accomplice to felony-murder must also be reversed and remanded for a new trial.

State v. Kosewicz, Supreme Court No. 83682-5, involves a similar issue. The summary of the issue as set forth on the Supreme Court website is:

> Whether in a prosecution for aggravated first degree murder and kidnapping, the Court of Appeals, in reversing the kidnapping conviction based upon instructional error, should have also reversed the jury's special finding that the murder was committed in the course of a kidnapping, made in support of the aggravated murder conviction.

Cumulative error requires reversal of the convictions and remand for a new trial.

Mr. Brown respectfully requests that his petition be granted.

DATED this 19TH day of July, 2010.

Respectfully submitted,

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APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27548-5-III**
	)	
Respondent and	)	
Cross-Appellant,	)	**Division Three**
	)	
v.	)	
	)	**UNPUBLISHED OPINION**
ROBERT ALAN BROWN,	)	
	)	
Appellant.	)	

KULIK, C.J. — Sebastian Esquibel was held in Robert Brown's trailer and eventually driven out to a field area where he was shot in the back of head. A jury convicted Mr. Brown of first degree kidnapping and felony murder, with the predicate felony of first degree kidnapping. Mr. Brown appeals, asserting two instructional errors, insufficient evidence, ineffective assistance of counsel, and cumulative error. We reverse and remand the first degree kidnapping conviction. We affirm the felony murder conviction.

FACTS

In May 2005, Levoy and Shannon Burnham lived in a fifth wheel trailer owned by and located on Robert Brown's property. Mr. Brown lived in a home near the trailer. Mr. Burnham attempted to arrange a drug deal involving Mr. Esquibel and Carlton Hristco. Mr. Burnham fronted $800 to Mr. Esquibel; however, Mr. Esquibel did not deliver any drugs or return Mr. Burnham's money.

At trial, Ms. Burnham testified that Mr. Burnham brought Mr. Esquibel to the trailer. Mr. Burnham asked Mr. Hristco to bring a gun to the trailer. In the trailer, Mr. Hristco saw Mr. Brown and Mr. Burnham with Mr. Esquibel. Mr. Esquibel looked uninjured. He was wearing only his boxer shorts. Mr. Hristco observed Mr. Brown and Mr. Burnham kicking and punching Mr. Esquibel. Shortly after arriving, Mr. Hristco left.

Theodore Kosewicz came into the trailer and joined in punching and kicking Mr. Esquibel. Mr. Burnham and Mr. Kosewicz repeatedly asked Mr. Esquibel about the money. They held Mr. Esquibel in the trailer overnight.

Mr. Burnham called Amber Johnson and asked for a ride. Ms. Johnson arrived at the trailer around 11:00 a.m. driving a van. Ms. Johnson testified that Mr. Esquibel was wearing only cut-off sweatpants and looked scuffed up. Mr. Burnham put Mr. Esquibel

in the van. Ms. Johnson stated that Mr. Brown knocked on the door of the trailer and talked with Mr. Burnham.

Ms. Johnson drove the van to various places in Spokane and eventually to a field area where Mr. Burnham and Mr. Kosewicz removed Mr. Esquibel from the van. Ms. Johnson testified that about one minute passed when she heard a gunshot. Mr. Burnham and Mr. Kosewicz returned to the van and Ms. Johnson drove away. Mr. Esquibel's body was found under a woodpile in Spokane County in January 2006. His ankles were tied with jumper cables and duct tape bound his wrists. Mr. Esquibel had a gunshot wound to the head.

On March 15, 2006, Mr. Brown agreed to speak with Detectives Douglass Marske and James Dresback about Mr. Esquibel's death. Mr. Brown told the detectives that he saw Mr. Esquibel in the trailer, sitting on the couch, wearing only his underwear. Mr. Brown told the detectives he knew Mr. Burnham and Mr. Hristco were trying to get their money back from Mr. Esquibel. After Mr. Brown returned to his house, he could hear screaming and a roofing nailer going off in the trailer. When Mr. Brown returned to the trailer later, he did not observe any injuries on Mr. Esquibel, so he concluded that Mr. Burnham and Mr. Hristco were using the roofing nailer to scare Mr. Esquibel.

Mr. Burnham asked Mr. Brown to find out if Mr. Esquibel was a member of the Mexican Mafia. After speaking with Amanda Brown, Mr. Brown determined that Mr. Esquibel did not belong to any Mexican gangs. Later, Mr. Burnham asked Mr. Brown to come out to the trailer, gave him a gun, and asked him to guard Mr. Esquibel. Mr. Brown complied. Mr. Brown also supplied jumper cables to Mr. Burnham.

Mr. Brown was ultimately charged with premeditated murder in the first degree, with aggravating circumstances, or, alternatively, with murder in the first degree, kidnapping in the first degree, and conspiracy to commit first degree kidnapping. The kidnapping charge alleged that Mr. Brown abducted Mr. Esquibel with the intent to inflict bodily injury. The first degree murder charge alleged felony murder, with kidnapping as the underlying felony.

At trial, jury instructions 15 and 16 stated that kidnapping can occur with the intent to inflict bodily injury or the intent to inflict extreme mental distress. The jury acquitted Mr. Brown of premeditated murder in the first degree and conspiracy to commit first degree kidnapping, but found him guilty of kidnapping in the first degree and murder in the first degree based on felony murder, with kidnapping as the underlying charge.

Mr. Brown appeals, asserting that kidnapping instructions 15 and 16 contained an uncharged alternative means, intent to inflict extreme mental distress, to committing

kidnapping and, therefore, the kidnapping charge should be reversed. Secondly, Mr. Brown asserts that because the jury erroneously found him guilty of kidnapping, the felony murder charge no longer has an underlying felony and that the felony murder conviction should be reversed as well. Mr. Brown also asserts insufficient evidence, error on the homicide definitional instruction, ineffective assistance of counsel, and cumulative error. The State cross-appeals, asserting the two deadly weapon enhancements, one for each felony, should be imposed consecutively, not concurrently.

ANALYSIS

Uncharged Alternative Means of Committing Kidnapping. Mr. Brown asserts the trial court erred by instructing the jury on an uncharged alternative means of committing kidnapping. Specifically, the second amended information charged Mr. Brown with kidnapping with the intent to inflict bodily injury. However, the jury instructions regarding kidnapping allowed the jury to convict if it found Mr. Brown acted with the intent to inflict bodily injury *or* the intent to inflict extreme mental distress.

Mr. Brown raises this issue for the first time on appeal. An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). It is well settled that alleged error regarding jury instructions is of

sufficient constitutional magnitude to be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000).

Kidnapping is an alternative means crime. A person commits kidnapping by abducting another person with the intent to inflict bodily injury or the intent to inflict extreme mental distress. RCW 9A.40.020. The State may charge a defendant with one or all of the alternative means outlined in the statute, so long as the alternatives are not repugnant to one another. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). However, if the information contains only one alternative, it is error to instruct the jury that it may consider any of the other alternative means of committing the crime. *Id.* The defendant has the right to notice of the crimes charged. Allowing the jury to consider uncharged alternative means violates the defendant's right to notice and is reversible error. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Here, Mr. Brown was charged only with kidnapping with the intent to inflict bodily injury. However, the trial court instructed the jury that it could find Mr. Brown guilty of kidnapping if he abducted Mr. Esquibel with the intent to inflict bodily injury or with the intent to inflict extreme mental distress. The trial court erred by instructing the jury that it could consider an uncharged alternative means of committing kidnapping.

An erroneous instruction is not automatically reversible error if it can be affirmatively shown that the error was harmless. Instructional error is harmless if there is no possibility that the defendant was convicted on the uncharged alternative. *State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989). Here, it is impossible to determine which alternative means each individual juror used to find Mr. Brown guilty of kidnapping. Thus, one or more jurors may have found Mr. Brown guilty of kidnapping under the uncharged alternative means. And we cannot affirmatively hold that the error was harmless.

We reverse and remand for a new trial on the first degree kidnapping charge.

Felony Murder as the Underlying Felony. Mr. Brown asserts that because he was erroneously convicted of kidnapping, there is no longer a felony to support felony murder and, therefore, the felony murder conviction should be reversed. The State asserts that the felony murder conviction does not require a separate conviction of the underlying felony to be valid. It asserts the elements of the underlying felony in felony murder are not elements of the crime of felony murder; therefore, it was not error to instruct the jury on uncharged alternative means of committing the underlying felony. As long as the State can prove the elements of the underlying felony and the elements of felony murder beyond a reasonable doubt, the felony murder conviction is valid.

The underlying felony in a felony murder charge is an essential element of felony murder; however, the elements of the underlying crime are not the elements of the crime of felony murder. *State v. Bryant*, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992). Thus, the elements of the underlying felony do not need to be pleaded. *Id.* And it is not necessary to plead the alternative means of the underlying felony. *State v. Hartz*, 65 Wn. App. 351, 354, 828 P.2d 618 (1992). In *Hartz*, the defendant was charged with felony murder with robbery as the underlying felony. The court held that the State was not required to allege the specific means of the robbery charge. *Id.* However, at trial, the State must prove beyond a reasonable doubt the elements of the underlying crime. *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987).

When the court instructs the jury that an offense can be committed in more than one way, the jury must unanimously agree that the defendant is guilty of the charged crime. The jury need not unanimously agree on the means by which the defendant committed the crime if substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Substantial evidence exists if a rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

Here, the second amended information charged felony murder with kidnapping as the underlying felony. The court instructed the jury that kidnapping can be committed by two alternative means: (1) with the intent to inflict bodily injury, or (2) with the intent to inflict extreme mental distress. The trial court did not give a unanimity instruction. Thus, we do not know which means the jury used to convict Mr. Brown. We then must determine if substantial evidence supports both alternative means of kidnapping.

The State presented evidence that Ms. Burnham saw Mr. Brown go in and out of the trailer while Mr. Esquibel was being held there. Mr. Hristco stated he saw Mr. Brown hit Mr. Esquibel. Ms. Johnson stated that she knew Mr. Brown came to the trailer and talked with Mr. Burnham when she picked up Mr. Esquibel, Mr. Kosewicz, and Mr. Burnham.

Mr. Brown confessed his participation to Detective Marske. Mr. Brown told Detective Marske he knew Mr. Esquibel was not in the trailer voluntarily. He knew Mr. Esquibel was kept in the trailer all day and night. Mr. Burnham sent Mr. Brown to find out if Mr. Esquibel was part of any Mexican gangs, fearing retaliation. Mr. Brown determined Mr. Esquibel did not belong to any Mexican gangs. Mr. Brown reported hearing a roofing nailer and some screaming from the trailer. He believed the roofing nailer was being used to intimidate Mr. Esquibel. Mr. Brown reported that he was not in

the trailer, but he knew that while the men tortured Mr. Esquibel—and to further intimidate him—they talked openly about how they were going to get rid of his body. Mr. Brown confessed to punching Mr. Esquibel in the head and hitting him while others also hit or kicked him. Mr. Brown told Detective Marske that he was "somewhat confident" the jumper cables used to tie Mr. Esquibel's ankles were his. Report of Proceedings (RP) at 531. Finally, Mr. Burnham asked Mr. Brown to guard Mr. Esquibel while he went out of the trailer. Mr. Burnham left Mr. Brown with a gun. Mr. Brown complied and did not allow Mr. Esquibel to leave the trailer. Mr. Brown told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him.

Based on the evidence, it is clear that a rational trier of fact could find beyond a reasonable doubt that Mr. Brown participated in kidnapping Mr. Esquibel under both alternative means. Mr. Hristco stated he saw Mr. Brown hit Mr. Esquibel, and Mr. Brown confessed to hitting Mr. Esquibel. Mr. Brown acted as an accomplice by checking to see if Mr. Esquibel was in any Mexican gangs. Mr. Brown knew the other men were hitting and kicking Mr. Esquibel while he was in the trailer. This satisfies the intent to inflict bodily injury means.

Mr. Brown knew Mr. Esquibel was being held against his will in the trailer all day and all night wearing only his underwear. Mr. Brown knew the other men were talking

about how to dispose of Mr. Esquibel's body while they tortured him. When Mr. Brown was left to guard Mr. Esquibel, he had a gun and he told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him. This satisfies the intent to inflict extreme mental distress means.

Because there is substantial evidence to support both alternative means, unanimity is not required. The trial court did not err by convicting Mr. Brown of felony murder based on the underlying felony of kidnapping.

Sufficient Evidence. Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When considering the sufficiency of the evidence, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Brown asserts that the State presented insufficient evidence to convict him of felony murder. To convict Mr. Brown of felony murder in the first degree, the State must

show that Mr. Brown committed or attempted to commit kidnapping in the first degree, "and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, cause[d] the death of a person other than one of the participants." RCW 9A.32.030(1)(c). To show Mr. Brown committed kidnapping in the first degree, the State must show that Mr. Brown intentionally abducted Mr. Esquibel with intent to either inflict bodily injury on Mr. Esquibel or to inflict extreme mental distress on Mr. Esquibel. RCW 9A.40.020.

The State must show that Mr. Brown was either the principal or an accomplice. Mr. Brown is guilty of a crime as an accomplice if the crime was committed by someone for which Mr. Brown is legally accountable. RCW 9A.08.020(1). Mr. Brown is legally accountable for the conduct of another if

> [w]ith knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a).

As noted above, Mr. Brown acted with the intent to inflict bodily injury and to inflict extreme mental distress on Mr. Esquibel. Mr. Burnham intentionally abducted Mr. Esquibel. The question is whether Mr. Brown acted as an accomplice to facilitate the

kidnapping and whether Mr. Brown intentionally abducted Mr. Esquibel. Mr. Brown was asked to find out if Mr. Esquibel was a member of any Mexican gangs because of a fear of retaliation. Mr. Brown did so. Mr. Brown also guarded Mr. Esquibel, while armed, and told Mr. Esquibel to shut up when Mr. Esquibel pleaded with him. Mr. Brown's actions show that he encouraged the kidnapping. He acted of his own free will. A rational trier of fact could conclude he knew his actions would facilitate kidnapping. The State presented sufficient evidence that Mr. Brown acted as an accomplice to first degree kidnapping.

Lastly, there must be sufficient evidence to show Mr. Esquibel died in the course or furtherance of the kidnapping. Mr. Esquibel was abducted and kept in the trailer, then driven to Mr. Hristco's house and Ms. Johnson's house. He was still being held against his will when he was taken out of the van and shot. Sufficient evidence shows that Mr. Esquibel was killed in the course of the kidnapping and to convict Mr. Brown of felony murder.

Washington Pattern Jury Instruction 25.01. Mr. Brown asserts that jury instruction 5, which stated "[h]omicide is the killing of a human being by the voluntary act, procurement, or *failure to act* of another," deprived him of a fair trial by misleading the jury into believing Mr. Brown could commit homicide by failing to act. Clerk's

Papers (CP) at 347 (emphasis added). Jury instruction 5 was based on the former Washington Pattern Jury Instruction 25.01, which was withdrawn because it was "no longer helpful to the jury." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 25.01 at 352, cmt. (3d ed. 2008).

As we noted above, an issue of manifest error involving a constitutional right is an exception to the rule prohibiting raising errors for the first time on appeal. RAP 2.5(a)(3). An error is a manifest constitutional error if the alleged error is a constitutional issue and the error actually prejudiced the defendant. *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004).

Here, Mr. Brown cannot show that jury instruction 5 was a manifest constitutional error because he cannot show actual prejudice. Only jury instruction 5 contains the language "failure to act." CP at 347. The court correctly instructed the jury in both the definitional instructions, as well as the "to convict" instructions for premeditated first degree murder and felony murder.[1] The trial court also correctly instructed the jury on

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[1] Jury instruction 6 read as follows:

> A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person unless the killing is excusable or justifiable.

CP at 348.

Jury instruction 7 read as follows:

As to Count 1:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the 18th day of May, 2005, and the 13th day of June, 2005, the defendant, as an actor or accomplice, killed SEBASTIAN L. ESQUIBEL;

(2) That the defendant, as an actor or accomplice, acted with intent to cause the death of SEBASTIAN L. ESQUIBEL;

(3) That the intent to cause the death was premeditated;

(4) That SEBASTIAN L. ESQUIBEL died as a result of the defendant's or an accomplice's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 349.

Jury instruction 13 read as follows:

A person commits the crime of murder in the first degree when he or she or an accomplice commits or attempts to commit kidnapping and in the course of or in furtherance of such crime or in immediate flight from such crime he or she or another participant causes the death of a person other than one of the participants.

CP at 355.

Jury instruction 14 read as follows:

As to Count 1 as an alternative:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the 18th day of May, 2005, and the 13th day of June, 2005, SEBASTIAN L. ESQUIBEL was killed;

(2) That the defendant, as an actor and/or accomplice, was

accomplice liability.[2] Furthermore, the State did not argue to the jury that Mr. Brown's failure to act caused the death of Mr. Esquibel. Instead, the State argued that Mr.

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committing or attempting to commit first degree kidnapping;

(3) That the defendant, as an actor and/or accomplice, caused the death of SEBASTIAN L. ESQUIBEL in the course of or in furtherance of such crime or in immediate flight from such crime; and

(4) That SEBASTIAN L. ESQUIBEL was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 356.

[2] Jury instruction 10 read as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an

Brown's actions assisted Mr. Kosewicz and Mr. Burnham in the kidnapping and death of Mr. Esquibel. Any error the trial court made did not cause actual prejudice to Mr. Brown; thus, we do not address this issue for the first time on appeal.

Ineffective Assistance of Counsel. To prove a claim of ineffective assistance of counsel, the claimant must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that trial counsel's performance was reasonable. *State v. Prado*, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). Trial counsel's conduct based on legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. *Id.*

In his brief, Mr. Brown asserts his trial counsel was ineffective because he failed to object to jury instructions 5, 13, and 14. In his statement of additional grounds, Mr. Brown asserts his trial counsel was ineffective because counsel failed to sufficiently investigate the case and failed to call any defense witnesses.

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accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 352.

As stated above, Mr. Brown was not prejudiced by jury instruction 5 and his counsel was not ineffective for failing to object to this instruction. We agree that the trial court committed reversible error by instructing the jury on uncharged alternative means in felony murder instructions 13 and 14.

Next, Mr. Brown contends his trial counsel was ineffective for failing to sufficiently investigate the case and for failing to call defense witnesses. Mr. Brown asserts there was physical evidence in the form of pictures, to which he directed his attorney, showing the prosecution's claims were incorrect. Mr. Brown contends these pictures would have swayed the jury. An attorney's decision whether or not to introduce evidence to the jury falls squarely within legitimate trial strategy. Similarly, an attorney's decision to call witnesses is trial strategy. We cannot conclude that either support a claim of ineffective assistance of counsel.

Cumulative Error. The cumulative error doctrine allows a defendant a new trial if multiple errors resulted in a trial that was fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

Mr. Brown asserts that, under the cumulative error doctrine, the constitutional errors in his trial entitle him to a new trial. However, the only error with merit is the

instructional error in kidnapping instructions 15 and 16. The cumulative error doctrine cannot be applied to a case without multiple errors.

STATEMENT OF ADDITIONAL GROUNDS

Conflict of Interest. Mr. Brown asserts two conflict of interest issues. He asserts that attorney James Kirkham was friends with Mr. Esquibel's family and that he agreed he would not work on Mr. Brown's case. Mr. Kirkham later deposed Amanda Brown. Mr. Brown also asserts the investigator working for his attorney had a conflict of interest because the investigator brought a lawsuit against Mr. Brown prior to the trial for this case.

Both of Mr. Brown's assertions contain facts that are not part of the record in this case. This court cannot review matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The proper avenue for review of these issues is a personal restraint petition. *Id.*

Prosecutorial Misconduct. Mr. Brown asserts prosecutorial misconduct based on a statement the prosecutor made in closing argument in which the prosecutor stated, "Who held Mr. Esquibel at gunpoint? Mr. Brown."[3] RP at 755. To constitute prosecutorial

[3] Mr. Brown asserts the prosecutor stated: "[Mr.] Brown held the victim at gunpoint;" however, this statement cannot be found in the record. It is assumed that Mr. Brown was referring to the statement quoted.

misconduct, a prosecutor's remark must be both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Absent an objection at trial, the defendant cannot raise the issue of prosecutorial misconduct unless the prosecutor's statement was so flagrant and ill-intentioned that it created an enduring prejudice throughout the record. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The prosecutor's comment was not objected to at trial and did not rise to the level of being so flagrant or ill-intentioned that it created an enduring prejudice. Mr. Brown cannot show prosecutorial misconduct based on this comment.

We reverse the first degree kidnapping conviction and remand for a new trial. We affirm the felony murder conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.